



U.S. Citizenship  
and Immigration  
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FILE: [REDACTED]  
EAC 03 210 50858

Office: VERMONT SERVICE CENTER

Date: NOV 07 2005

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

  
Robert P. Wiemann, Director  
Administrative Appeals Office

**DISCUSSION:** The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The director found that the petitioner had not established that it had the continuing financial ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits additional evidence and contends that the petitioner has demonstrated its continuing financial ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date. The filing date or priority date of the petition is the initial receipt in the DOL's employment service system. See 8 C.F.R. § 204.5(d). Here, Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on Form ETA 750 is \$11.87, based on a 35-hour week or \$21,603.40 per year. On Form ETA 750B, signed by the beneficiary on March 27, 2001, the beneficiary does not claim to have worked for the petitioner.

On Part 5 of the petition, filed June 23, 2003, the petitioner claims to have been established in 1999, have a gross annual income of \$503,195, a net annual income of \$3,300, and to currently employ three workers.

In support of its ability to pay the proffered salary, the petitioner submitted a copy of its Form 1120, U.S. Corporation Income Tax Return for 2001. It indicates that the petitioner files its taxes uses a standard calendar year to file its taxes. It shows that the petitioner reported net taxable income of -\$3,886 before the net operating loss (NOL) deduction. Schedule L of the tax return reveals that the petitioner had \$1,324 in current assets and no current liabilities, resulting in \$1,324 in net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities and represent a measure of liquidity and a possible readily available resource to pay a certified wage. Besides net income, Citizenship and Immigration Services (CIS) will review a corporate petitioner's net current assets as an alternative method of examining its ability to pay a

proffered wage. A corporation's year-end current assets are shown on line(s) 1(d) through 6(d) of Schedule L and current liabilities are shown on line(s) 16(d) through 18(d). If a corporation's year-end net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

On September 8, 2004, the director denied the petition concluding that neither the petitioner's 2001 net income of -\$3,886, nor its net current assets of \$1,324 could support the payment of a proposed wage offer of \$21,603.40 per year.

On appeal, counsel resubmits a copy of the petitioner's 2001 federal tax return, as well as copies of its 2002 and 2003 tax returns. Counsel also provides a letter from an accounting firm stating that the petitioning corporation and another corporation are both owned by the same shareholder. Also submitted are copies of the 2001-2003 tax returns of the other corporation and copies of the petitioner's checking account statements from January 2001 to August 2004. Finally, counsel submits copies of Wage and Tax Statements (W-2s) showing that the petitioner paid the beneficiary \$15,600 in 2002 and \$18,600 in 2003. The petitioner's federal tax returns for 2002 and 2003, submitted on appeal contain the following information:

Year	2002	2003
Net taxable income before net operating loss (NOL) deduction	-\$12,402	-\$ 3,050
Current Assets	\$14,844	\$9,913
Current Liabilities	-0-	-0-
Net Current Assets	\$14,844	\$9,913

Counsel asserts that the effects of the September 11<sup>th</sup> and sniper/anthrax attacks occurring in the Washington DC area adversely affected the petitioner's business in the last quarter of 2001 and that despite these conditions, the petitioner has increased its revenue and profits during the three years between 2001 and 2003. Counsel cites the petitioner's increasing gross revenues from \$503,195 in 2001 to \$579,591 in 2003, as well as the \$36,000, \$50,000, and \$78,000 taken as officer compensation in 2001, 2002, and 2003, respectively. He argues that pursuant to *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967), the petitioner's ability to pay the certified wage should be based on the expectations of increasing business. Counsel further suggests that such compensation often represents distribution of profits and that the \$36,000 paid out in 2001 represented additional funds that could have been paid to the beneficiary, instead of the petitioner's officer(s). It is also asserted that the officer compensation from the second corporation owned by the same individual could also have been applied toward the proposed wage offer. Counsel finally points to the petitioner's opening balances on its bank statements as a more reliable indicator of the petitioner's cash flow and ability to pay the monthly proffered wage.

In this case, CIS will not consider the officer compensation amounts presented on the petitioner's tax returns simply because they belong to the principal shareholder. Such compensation is paid to individuals who materially participate in a business. Many of the duties performed by the officer(s) are not the same as those to be performed by the beneficiary and as such, the compensation would not be considered to be an available source with which to pay the beneficiary. In this case, it is also noted that the amounts designated as officer compensation would have to sustain a comparatively significant reduction in order to increase the net income to a

level sufficient to meet the proffered wage. The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) also considered whether the personal assets of one of a corporate petitioner's directors should be included in the examination of the petitioner's ability to pay the proffered wage. In rejecting consideration of such individual assets, the court stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." Similarly, the financial information presented on the other corporation's tax returns cannot be included in the consideration of the petitioning corporation's individual ability to pay the proffered wage. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm. 1980). Consequently, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Whether a petitioner has employed and paid wages to a given beneficiary will be considered. If a petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. If either the petitioner's net taxable income or net current assets can cover any shortfall resulting from a comparison of actual wages paid to the proffered wage, then the petitioner's ability to pay the certified wage may also be demonstrated for a given period. In the instant case, the record reveals that that the beneficiary's 2002 wages were \$6,003.40 less than the proffered salary in 2002 and \$3,003.40 less than the certified wage in 2003.

In determining the petitioner's ability to pay the proffered wage during a given period, CIS will examine the net income figure reflected on the petitioner's federal income tax return(s), without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that wages paid to other employees reached a specified level or exceeded the proffered wage is not sufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid, rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend that depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. See *Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support. (Original emphasis.) *Chi-Feng* at 537.

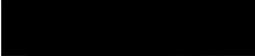
Counsel's reliance on the petitioner's bank statements as determinative of the petitioner's ability to pay the proffered annual salary of \$21,603.40 is misplaced. Bank statements are not among the three types of evidence,

enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Further, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its 2001 tax return, such as the cash specified on Schedule L that has already been considered in determining the petitioner's net current assets. As current assets, balances reflected on bank statements must also be balanced against obligations represented as current liabilities. Thus bank statements illustrate only a portion of a petitioner's financial status but do not establish the full extent of a petitioner's assets and liabilities. Counsel also relies upon a January 2002 AAO case in support of his assertion that bank statements may be a persuasive form of evidence to be considered. The case cited by counsel is not considered a binding precedent within the regulation(s) at 8 C.F.R. § 103.3(c) and 8 C.F.R. § 103.9(a), which provide that decisions designated as precedent decisions must published in bound volumes or as interim decisions. Moreover, the facts of that case also involved a petitioner whose net current assets were well above the amount necessary to pay the proffered wage in each of the relevant years.

Counsel is correct that *Matter of Sonogawa* is sometimes applicable where the expectations of increasing business and profits overcome evidence of small profits. That case, however relates to petitions filed during uncharacteristically unprofitable or difficult years within a framework of profitable or successful years. During the year in which the petition was filed, the *Sonogawa* petitioner changed business locations, and paid rent on both the old and new locations for five months. There were large moving costs and a period of time when business could not be conducted. The Regional Commissioner determined that the prospects for a resumption of successful operations were well established. He noted that the petitioner was a well-known fashion designer who had been featured in *Time* and *Look*. Her clients included movie actresses, society matrons and Miss Universe. The petitioner had lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. In this case, the petitioner, a four-year operation at the time of filing the petition, has reported losses of net income in each of the relevant years. Relatively modest net current assets declined from 2002 to 2003. Although the effects of various events, including the September 11<sup>th</sup> tragedy, on the petitioner's business have been hypothesized, no specific evidence has been presented to establish that the petitioner's overall financial profile in 2001 was a radical departure from other years.

In this case, the data from Schedule L of the tax returns submitted to the underlying record and on appeal reveals that although the petitioner's net current assets were sufficient to show that the petitioner could pay the proffered wage in 2002 and 2003 by covering the difference between the actual amounts paid to the beneficiary and proffered wage, they failed to show that the certified salary could have been paid in 2001.

The regulation at 8 C.F.R. § 204.5(g)(2) requires a petitioner to demonstrate a *continuing* ability to pay the proposed wage offer beginning at the priority date established when the labor certification was first accepted for processing by the DOL. Following a review of the federal tax returns and other documentation furnished, the petitioner has failed to establish that it has had the continuing financial ability to pay the proffered wage beginning at the priority date.



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The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.